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In the Supreme Court
of the United States

October Term, 1953

No.....

RESERVE LIFE INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

C. H. SIMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on July 17, 1953.

OPINIONS BELOW

The opinion of the District Court (R. 16) is not reported.

The opinion of the Court of Appeals (R. 414) was not yet reported at the time of filing of this Petition.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered July 17, 1953 (R. 414-417). An order of the Court of Appeals denying Petitioner's petition for a rehearing was entered August 25, 1953 (R. 418). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Whether the Court of Appeals erred in holding that the District Court's findings of fact that certain slanderous words were spoken and published by Petitioner of and concerning Respondent resulting in damage to Respondent were supported by substantial evidence and were not clearly erroneous.

2. Whether the Court of Appeals erred in holding that the words which the District Court found were spoken were not qualifiedly privileged.

3. Whether the Court of Appeals erred in holding that the District Court was correct in concluding that Respondent was entitled to recover of Petitioner $8,500.00 and costs.

STATEMENT

A complaint was filed March 24, 1949, in the United States District Court for the District of Oregon by Respondent against Petitioner alleging that Petitioner had made certain malicious and slanderous remarks about Respondent and thereby caused him damage (R. 3). An answer in the form of a general denial was filed by Petitioner on June 3, 1949 (R. 8). On October 17, 1950 the District Court dismissed the cause for want of prosecution (R. 9). Thereafter on the 14th day of June, 1951 the order of dismissal was vacated and the case was reinstated (R. 15). The trial was had before the Hon. Claude McCulloch on the 14th and 16th days of June, 1951. On July 6, 1951 a Memorandum of Decision was issued indicating that judgment would be for Respondent (R. 16). Proposed Findings of Fact and Conclusions of Law were filed to which objections were filed August 14, 1951 (R. 17). An Amended and Supplemental Complaint was filed by Respondent August 27, 1951 for the purpose of causing the complaint to conform to the evidence (R. 23). An Answer to Amended and Supplemental Complaint was filed by the Petitioner on August 29, 1951 (R. 27). On August 30, 1951 the Court signed the Findings of Fact and Conclusions of Law (R. 30) and on September 1, 1951 entered judgment for Respondent in the sum of $3,500.00 general damages and $5,000.00 special damages (R. 36). The Court found that certain slanderous words were spoken by Petitioner of and concerning Respondent, in the hearing of sundry and divers persons, that said words were actuated by

express malice, were not made in good faith or with an honest belief in their truth, nor did Petitioner have any duty to make such statement; that Respondent was thereby specially damaged in the sum of $5,000.00 and generally damaged in the sum of $3,500.00. The Conclusions of Law were that Respondent was entitled to judgment of $8,500.00 and costs. Thereafter, on stipulation of the parties (R. 37) an amended judgment was entered September 8, 1951 (R. 39) awarding Respondent $5,000.00 special damages and $3,500.00 general damages. On September 10, 1951 Petitioner filed a motion for New Trial (R. 41), and on October 29, 1951 the Court order that the judgment be opened and further hearings be had (R. 44). On Nov. 21, 1951 further hearings were had and on November 27, 1951 the Court entered its Order Confirming Judgment (R. 44).

The Court below held that all the findings were supported by substantial evidence and that none were clearly erroneous. It held further that none of the words spoken were qualifiedly privileged. It held further that the District Court correctly concluded that Appellee was entitled to recover of Appellant $8,500.00 and costs (R. 414-417). By an Order dated August 25, 1953, the Court below refused to grant a rehearing (R. 418).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the District Court's findings of fact that certain slanderous words were spoken and published by Petitioner of and concerning Respondent resulting in damage to Respondent were supported by substantial evidence and were not clearly erroneous.

2. In holding that the words which the District Court found were spoken were not qualifiedly privileged.

3. In holding that the District Court was correct in concluding that Respondent was entitled to recover of Petitioner $8,500.00 and costs.

REASONS FOR GRANTING THE WRIT

Our decision to Petition this Court for a Writ of Certiorari in this cause was greatly influenced by the profound effect which the decisions below, if permitted to stand, will have upon the operations of the insurance industry as a whole, the operations of the petitioner's business and the operations of almost every business which maintains branch offices and employs branch managers and sales agents who handle company funds.

In its inception, this case arises from alleged shortages in the accounts of the Respondent, who was the Salem, Oregon branch manager for Petitioner in its hospitalization, health and accident insurance sales business. That there were unexplained shortages in Re-

spondent's accounts cannot be denied. His own accountant, after taking credit for every possible item, admitted that there remained a shortage of $353.00 (R. 377). The Petitioner found a total shortage of approximately $1,000.00 (R. 81, 376). It is in connection with the investigation of these shortages and inquiries with regard thereto and in the climate of mutual irritation, charges and counter-charges, that the words set forth in the Findings of Fact were allegedly spoken.

The insurance industry has become one of vast size and importance. In 1950, shortly after the time of the alleged incidents, in the insurance industry over 760,000 persons earned their livelihood, of whom 278,120 were agents and brokers. 1950 *Population Census Report P-C1, Preprint of Volume II, Part* 1, *Chapter C, Tables* 126 *and* 130, *U. S. Government Printing Office,* 1953. The Petitioner alone, in its Hospitalization, Health and Accident division maintains branch offices in 39 states and the District of Columbia and employs some 4000 sales agents (R. 249).

It is apparent, then, that the decision in this case is of great importance in the insurance industry as a whole, as well as in the Petitioner's business. The sales agents and branch managers are required to handle premium funds received by them from persons desiring insurance and to account for them to their employers. If every time an investigation is made by the employer of possible shortages in employees' accounts it is faced by the probability of a suit for slander, it is obvious that the operations of the companies will be seriously ham-

pered. The case becomes even more extreme where, as here, there are large shortages which the branch manager or sales agent cannot or will not explain. If in such circumstances the attempt of the employer to clear up the shortages is to make him liable in damages for slander, then it is apparent that no employer can seek to clear up such shortages and there is no incentive to the employees for honesty and efficiency. No large business organization can long exist in such a climate.

Nor is the insurance business alone affected. There are many other industries employing persons who handle money. Thus in 1950 there were over 536,175 persons employed in the real estate business of whom 120,325 were salesmen and brokers. And in 1950 there were 2,042,229 salesmen and sales clerks employed in the United States, 1950 *Population Census Report P-C1, Preprint of Volume II, Part* 1, *Chapter C, Tables* 126 *and* 130, *U. S. Government Printing Office,* 1953.

It is common knowledge that virtually all such salesmen handle money of the employer in one way or another. It becomes vitally important to the employer to keep control of its funds by holding its employees who handle them accountable to it for the funds handled. Yet, if this decision and judgment stand, it will be hazardous indeed for any employer to question his employee's accounting of his funds, even where, as in the subject case, there is a large shortage (R. 81, 376) and the employee refuses to cooperate in clearing it up (R. 252, 253).

In the circumstances above indicated, the record shows that there was no real basis for the findings that

Respondent had been slandered by Petitioner. There was no substantial evidence to support such a finding, and the trial court clearly erred in so finding.

It is interesting to note the chronological sequence of the procedural events in this case. The original Complaint was filed March 24, 1949 alleging that Petitioner made certain slanderous statements to Respondent's employer and to the Insurance Commissioner of the State of Oregon (R. 3). A Motion to Make More Definite and Certain was filed April 28, 1949 (R. 6). The Respondent's deposition was taken on June 2, 1949 (R. 72). In the deposition Respondent stated that no slanderous remarks had been made by Petitioner to the Insurance Commissioner (R. 72). At the trial he testified that he must have been mistaken in the deposition (R. 73). In the deposition Respondent stated that he based his complaint on a report his employer had made of an alleged conversation with Petitioner's officers (R. 129). At the trial Respondent testified he must have been mistaken in the deposition (R. 129). At the trial on June 14th and 16th, 1951, testimony was had of words allegedly spoken by Petitioner's officers and employees to Respondent's wife (R. 86), Petitioner's branch manager (R. 94), Respondent's attorney (R. 113), Petitioner's salesmen (R. 121) and officers of the unemployment office (R. 157). Thereafter, on July 6, 1951, the Memorandum of Decision was filed (R. 16) which called for submission of proposed findings of fact and directed that the complaint "be amended and broadened to conform to the proof." Thereafter, Respondent presented to Petitioner Findings of Fact and

Conclusions of Law which are not in the record. Objections to said proposed Findings were filed by Petitioner on Aug. 14, 1951 (R. 17). Thereafter Respondent moved the Court for leave to file an amended complaint on August 27, 1951 (R. 22), the amended and supplemental complaint was filed on August 27, 1951 (R. 23). An answer was filed August 29, 1951 (R. 27) and the Findings of Fact and Conclusions of Law as originally proposed were filed August 30, 1951 (R. 30). The Findings of Fact repeat virtually word for word the allegations of the Amended Complaint. In addition further findings are made which negate conditional privilege.

It appears to the Petitioner that this method of proceeding leaves the defendant helpless and unable to prepare a defense even after having taken depositions. At the trial, the plaintiff introduced a large volume of testimony, much of it in contradiction to his earlier deposition, which was taken in lieu of an order to make more definite and certain. And, after the trial was over, the complaint was amended and supplemented to build a perfect case, the Findings of Fact were tailored to fit and the judgment caps the perfect record.

It is submitted that such proceedings are fraught with grave danger to litigants, and that this Court should carefully examine the record in the light of this danger.

ARGUMENT

The general rule with regard to the review of the Findings of Fact and Conclusions of Law of a trial court sitting without a jury by an appellate court is set forth in Federal Rules of Civil Procedure, Rule 52 (a):

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. . . ."

This Court has defined the limits of this rule in *United States vs United States Gypsum Co.*, 333 U.S. 364, 394, 68 Sup. Ct. 525, 92 L. Ed. 746, as follows:

> "It was intended in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the Appellate. The findings were never conclusive, however."

The mere fact that there is some evidence to support the Findings does not necessarily make said Findings irrevocable. This Court stated the rule in *United States vs. United States Gypsum Co.* supra, at page 395 as follows:

> "A finding is 'clearly erroneous' when, although there is evidence to support, it, the reviewing court

on the entire evidence is left with the definite and firm conviction that a mistake has been made."

The findings of fact that certain slanderous words were spoken and published by Petitioner of and concerning Respondent resulting in damage to him were not supported by substantial evidence. Substantial evidence means more than a more scintilla. It is not mere uncorroborated hearsay or rumor. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. vs. National Labor Relations Board,* 305 U.S. 197, 229, 59 Sup. Ct. 206.

It is submitted that an examination of the record will show that the Findings of Fact here were based on hearsay, rumor, innuendo and wild charges. and that the lower court erred in sustaining them.

The interest of the public in the ready communication of facts with regard to present or former employees between interested parties is very great. Such communications, and others of a similar nature are under varying circumstances protected for and in behalf of the public good. The modern rule is set forth in *Restatement, Torts, Section* 595.

The Findings of Fact which the opinion of the lower court finds are correct brand the alleged words spoken as not spoken in good faith nor with an honest belief in their truth nor in pursuance of any duty to speak, but that such words were spoken with express malice. The Findings are all inclusive. All of the words alleged are excluded from any privilege.

An examination of the record shows that several of the words were spoken by employees of Petitioner to other employees of petitioner in the process of attempting to clear up the records of Petitioner's Salem office (R. 105) and by employees of Petitioner to the employer of Respondent in answer to inquires by said employer. (R. 108, 111, 177). These words were clearly privileged as being in the public interest. Yet the lower court held that the trial court was correct in holding that none of the alleged words were spoken in good faith nor in pursuance of any duty to speak, nor were they conditionally privileged.

Moreover, the lower court has on the question of malice, apparently overlooked entirely the climate in which the alleged words were spoken. The surrounding circumstances with regard to the shortages in Respondent's accounts and his uncooperativeness are fully revealed in the record and are set forth in some detail in Reasons for Granting the Writ, above. In *Kroger Grocery & Packing Company vs. Yount,* 66 Fed. 2d 700, 92 A.L.R. 1166, the Court clarified the rule as to the climate in which the words were spoken as follows, at page 703:

> "We must view the situation as it appeared to him at the time of the making of the statements complained of, and not in the light of later developments"

and at page 704, cited with approval the earlier case of *Massee vs. Williams,* 207 F. 222, 230, as follows:

> "Honest indignation and want of sound judgment on the part of the defendant and his employment of strong words, if he thought them justified, were not evidence of malice."

We have not heretofore quarreled with the trial court's findings and conclusions that Respondent was entitled to recover of Petitioner $5,000.00 special damages and $3,500.00 general damages, for we have felt that the trial court's error in its other findings were such as to justify reversal. But, the lower court specifically states in its opinion that the District Court's conclusions with respect to damages were correct.

In view of this specific statement by the lower court an examination of the record, at least with regard to special damages, is in order. The Amended Complaint alleges special damage of $8,400.00 (R. 25). But there is nothing at all in the record other than Respondent's testimony that he had earned $400.00 per month while in Petitioner's employment and only $25 per week thereafter (R. 169) to show any specific loss of money by Respondent to support this allegation. The Respondent merely testified that after being discharged by Petitioner he had been unable to secure employment in the insurance business and after some time he had gone back to school.

The trial court found that Petitioner was specially damaged in the sum of $5,000.00. This was computed as follows: Finding XIV and XV that Respondent earned $400.00 per month at the time of leaving Petitioner and would have continued to do so for 28 months except for the words spoken by Petitioner (R. 33, 34), a total of $11,200.00. That by reason of Respondent's inability to earn more than $100.00 per month from February, 1949 to May, 1951, a total of $3,050.00, he was specially dam-

aged in the sum of $5,000.00 (Findings XVII and XVIII, R. 34).

There is nothing else in the record to show what Respondent earned at the time he left Petitioner's employment, what he earned after he left Petitioner's employment or what he would have earned had he worked at insurance sales. Yet, somehow the flat figure of $5,000.00 special damage is arrived at. It is submitted that the lower court was clearly wrong in holding that such findings and the conclusion based thereon were not clearly erroneous.

CONCLUSION

For the foregoing reasons, it is respectively submitted that the United States Court of Appeals for the Ninth Circuit erred in holding that the Findings of the District Court were supported by substantial evidence and none were clearly erroneous, that the words spoken were not qualifiedly privileged and that the conclusion with regard to damages was correct.

This petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1953

No. 411

RESERVE LIFE INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

C. H. SIMPSON,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OFFICIAL REPORTS

The district court did not deliver a formal opinion; its Memorandum Decision is contained in the transcript (R. 16).

The Court of Appeals opinion is reported in Volume 206 Federal Reporter, Second Series, at page 389; Reserve Life Ins. Co. v. Simpson, 206 F. 2d 389. See opinion (R. 414).

JURISDICTION

As stated by petitioner, the opinion and judgment of the Court of Appeals were entered on July 17, 1953 (R. 414-417), and that court's order denying its petition for rehearing was entered August 25, 1953 (R. 418). Petitioner has invoked the jurisdiction of this Court under 28 U.S.C., Section 1254 (1).

STATEMENT OF THE CASE

No more concise statement of the case can be found than that contained in the opinion of the Court of Appeals. We quote therefrom:

> "On March 24, 1949, appellee, C. H. Simpson, a citizen of Oregon, brought an action against appellant, Reserve Life Insurance Company, a Texas corporation, in the United States District Court for the District of Oregon. In and by that action, appellee sought to recover of appellant $33,400 and costs. Appellant answered, jury trial was waived, there was a trial without a jury, findings of fact and conclusions of law were stated, and on September 8, 1951, a judgment was entered for appellee for $8,500 and costs. This appeal is from that judgment.
>
> "The District Court found the facts to be as follows: Prior to February 4, 1949, appellee was employed by appellant in Oregon. On or about February 4, 1949, appellee resigned from appellant's employment and secured employment in Oregon with Inter-Ocean Insurance Company. Thereafter, in February, 1949, appellant, through its agents, spoke and published, in the hearing of sundry and divers persons, slanderous words of and concerning

appellee, stating that appellee was 'irresponsible,' 'crooked,' 'guilty of defalcations in his accounts,' 'a trouble maker' and 'a crook'; that appellee 'stole all the company records,' 'had stolen company property and funds,' 'had misappropriated company money' and 'had taken all the office furniture'; and that appellant 'would see him in jail,' 'would put him in jail' and 'would see him behind bars.' The slanderous words were spoken and published by appellant, not in good faith or with an honest belief in their truth, but was express malice. Appellant had no duty to speak or publish them. As a natural and probable result and consequence of appellant's speaking and publishing the slanderous words, the persons in whose hearing they were spoken and published by appellant repeated them to other persons. By reason of such speaking, publication and repetition of the slanderous words, appellee was discharged by Inter-Ocean Insurance Company in February, 1949, and was handicapped in obtaining other employment, so that his earnings from February, 1949, to May, 1951, were $3,500 less than they would have been if the slanderous words had not been spoken or published. Thus appellee was specially damaged in the sum of $3,500. In addition, he was generally damaged in the sum of $5,000.

"All the findings were supported by substantial evidence. None of them was clearly erroneous. We therefore accept them all as correct. See Rule 52(a) of the Federal Rules of Civil Procedure.

"Appellant contends that the slanderous words were qualifiedly privileged. However, as indicated above, the District Court found that the slanderous words were spoken and published by appellant, not in good faith, or with an honest belief in their truth, but with express malice, and that appellant had no duty to speak or publish them; and, as indicated above, we accept these findings as correct. We therefore reject the contention that the slander-

ous words were qualifiedly privileged. Cf. Ivie v. Minton, 75 Or. 483, 147 P. 395; Mount v. Welsh, 118 Or. 568, 247 P. 815; Peck v. Coos Bay Times Publishing Co., 122 Or. 408, 259 P. 307; Kilgore v. Koen, 133 Or. 1, 288 P. 192; Israel v. Portland News Publishing Co., 152 Or. 225, 53 P. 2d 529; 53 C.J.S., Libel and Slander, §§ 89-101, 107, 109.

"On the facts found, the District Court correctly concluded that appellee was entitled to recover of appellant $8,500 and costs."

Reserve Life Ins. Co. v. Simpson, 206 F. 2d 389. (R. 414).

The findings set forth in the opinion appear in the transcript (R. 31-35).

All the questions presented by the petition (p. 2) and specifications of error to be urged (p. 5) were contained in the specifications of error set forth by petitioner in its Appellant's Brief in the Court of Appeals.

The opinion of the Court of Appeals, heretofore quoted, speaks for itself. By order dated August 25, 1953, the court refused to grant a rehearing (R. 418).

The District Court did open its judgment on motion of petitioner and take additional testimony (R. 44, 284-405).

SUMMARY OF ARGUMENT

1. The petition and brief contemplates a review of findings of fact by this Court after two lower courts have concurred therein; no legal question is presented.

2. There is no reason for granting the petition, and the petition states no such reason.

ARGUMENT

I.

The petition and brief contemplates a review of findings of fact by this Court after two lower courts have concurred therein; no legal question is presented.

Petitioner's petition and brief discloses on its face that it raises no legal question whatsoever. It seeks nothing more than a review by this Court of the findings of fact of two lower courts. The first question which the petition states is presented shows on its face that it is purely a question of fact. The second question presented is obscure in its language in stating that the Court of Appeals erred in holding the words spoken were not qualifiedly privileged. The District Court found that the words spoken were not spoken in good faith nor with an honest belief in their truth, nor in pursuance of any duty to speak, but that such words were spoken with express malice. The Court of Appeals concurred in these findings and, for this reason, rejected the contention of qualified or conditional privilege. Petitioner concedes this in its petition. It states: "In addition further findings are made which negate conditional privilege." (p. 9). It further concedes this in its argument, from which we quote: "The Findings are all inclusive. All of the words alleged are excluded from any privilege." (p. 11).

Petitioner, although conceding that the findings of fact concurred in by the two lower courts foreclose the question of qualified privilege, again raises the question

thereof. Necessarily, he raises a question of fact. His argument also discloses that he raises such a question only.

The third question which petitioner says is presented deals with damages. This is obviously a question of fact.

II.

There is no reason for granting the petition, and the petition states no such reason.

The rules of this Court indicate the character of reasons which will be considered when petitions for certiorari are filed. Supreme Court Rules, Rule 38(5). None of the type of reasons indicated are present or urged by petitioner. No special or important reasons are set forth. Petitioner's statement, which appears to be its reason for urging this Court to grant the writ, that the decision in this case will affect its operations and those of many others similarly situated, is untrue. This is an isolated case of slander. The decision of the courts below is based upon the established principles of law covering slander. These principles affect insurance companies no more than any other individual or corporation, and cannot possibly affect the future business operations of insurance companies or those similarly situated who conduct their business in a sound and ethical manner with due regard for the rights of others. In this case the slanderous words were not in good faith, there was no honest belief in their truth, they were spoken and published with express malice, and petitioner

had no duty to speak or publish them. The decision affects the proper business practices of no one.

No other insurance companies have manifested any interest whatsoever in this case.

CONCLUSION

The District Court and the Court of Appeals have painstakingly considered the law and the facts in this case. The District Court not only heard the evidence at the original trial but opened the judgment on motion of the petitioner and took additional testimony. The Court of Appeals had the entire record before it, passed upon the evidence and affirmed the judgment of the lower court in every particular. A motion for a rehearing was filed in that court and denied. This petition seeks a review by this Court of findings of fact which have been concurred in by two lower courts. No question of law is raised and, indeed, there is no important question of law which could possibly be raised. The decision in this case is of no importance to anyone save petitioner and respondent, and does not affect the sound, ethical and proper business practices of any individual or corporation.

The petition should be denied.

Respectfully submitted,

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